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IN THE

Supreme Court of the United States

No. 70-5009

THEON JACKSON,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE COUNCIL FOR EXCEPTIONAL CHILDREN, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AND THE NATIONAL ASSOCIATION FOR RETARDED CHILDREN AS AMICI CURIAE

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It is hereby respectfully moved pursuant to Rule 42 of the Rules of this Court that the above named *amici curiae* be granted leave to file the accompanying brief on the merits.

The lateness of this submission is due to the fact that *amici* have only recently been notified of the pendency of this litigation. Consent to such filing has been requested and has been granted on behalf of petitioner, but denied on behalf of respondent, the State of Indiana. A draft of the brief of *amici* attached hereto was sent to respondent and petitioner on August 25, 1971.

The interest of *amici curiae,* as stated in the accompanying brief, is as follows:

The American Association on Mental Deficiency has, since its founding in 1876, been engaged in efforts to improve the society's treatment of the mentally deficient. To this end, the Association has published widely accepted standards for terminology and classification of the mentally deficient. Additionally, the Association has undertaken a wide range of activities to improve the status and treatment of the mentally deficient. The Association has a current membership of approximately 10,000, who are generally active in all phases of care and treatment of the mentally deficient.

The Council for Exceptional Children was founded in 1922. Its primary concern has been to assure education and appropriate treatment by society of the handicapped, including those with language and intellectual deficiencies, regardless of chronological age. For the past five years, the Council has conducted extensive research on state laws and state programs relating to the handicapped. It also publishes numerous journals and books regarding the handicapped. The Council has 40,000 members including educators, psychologists, researchers, and others directly concerned with the problems of the handicapped.

The American Orthopsychiatric Association is an organization concerned with the problems of mental deficiency, mental disorder and abnormal behavior. The Association has a membership of approximately 3,500, composed of psychiatrists, psychologists, psychiatric social workers, and persons drawn from the related fields of anthropology, sociology, education, and allied professions. The Association seeks to coordinate and integrate the activities of specialists who are concerned with normal and abnormal behavior. The Association has as one of its objectives the fostering of research. The Association publishes a learned journal, *The American Journal of Orthopsychiatry*, now in its thirty-seventh year of publication. Its last annual meeting was attended by more than 10,000. The American Orthopsychiatric Association has a long-standing interest in the medical and civil rights of the mentally ill and the mentally deficient.

The National Association for Retarded Children is a voluntary organization devoted solely to promoting the welfare of America's over six million retarded citizens. The Association is represented in all fifty states by approximately 1,500 state and local member units comprised of over 225,000 members. Its membership includes parents of retarded children, professional persons including physicians, teachers, psychologists, social workers and clergymen, and other persons interested in mental retardation. Some of the Association's major activities include the promotion of the general welfare of mentally retarded persons regardless of chronological age, the furtherance of research, the development of a better understanding of the problem of mental retardation by the general public via the dissemination of information, the initiation and development of programs and services for the mentally retarded, the furtherance of training and education of persons for work in careers relating to mental retardation, and the implementation of legislation on behalf of mentally retarded persons.

Amici curiae have a long-standing concern with laws which discriminate against the mentally ill and the mentally retarded. The automatic incarceration for an indefinite term of persons accused of crime and found incompetent to stand trial is in this category.

The instant case provides a particularly striking example of the inequities which can flow from this practice. The indeterminate sentence passed on the petitioner was without any finding that he was a danger to himself or others, that he had committed a crime, or that he could ever be made competent to stand trial.

Amici curiae have an interest in these matters which transcends the particulars of this case. These organizations, dedicated to the protection of the civil and human rights of the mentally ill and the mentally deficient, believe that such practices as are evidenced in petitioner's case unconstitutionally deprive the mentally ill and the mentally deficient of the equal protection of the laws, the right to bail, and

the right to a speedy trial. The rights of the many million mentally ill and mentally deficient persons within the United States, though particularly susceptible to abuse, are no less precious than the rights of any other group. *Amici* believe that the rights of this entire class of persons must be protected. In view of this broad interest, our perspective differs from that of petitioner, and we believe that a separate expression of views is warranted.

Respectfully submitted,

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QUESTIONS DISCUSSED BY AMICI

Whether the automatic commitment for an indefinite term of criminal defendants found to be incompetent and unlikely to be restored to competence within a reasonably short period of time, without traditional civil commitment safeguards, deprives them of (a) the equal protection of the laws, (b) the right to bail, and (c) the right to a speedy trial.

INTEREST OF AMICI CURIAE

The American Association on Mental Deficiency has, since its founding in 1876, been engaged in efforts to improve the society's treatment of the mentally deficient. To this end, the Association has published widely accepted standards for terminology and classification of the mentally deficient. Additionally, the Association has undertaken a wide range of activities to improve the status and treatment of the mentally deficient. The Association has a current membership of approximately 10,000, who are generally active in all phases of care and treatment of the mentally deficient.

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SUMMARY OF ARGUMENT

Petitioner is a retarded deaf-mute with a mental age of 3 or 4. He was charged with two robberies, involving nine dollars, and because of his afflictions has been indeterminately confined in a state mental hospital for almost three years, based on a court finding that he was incompetent to stand trial on the robbery charges. This compulsory hospitalization which, because of the nature of petitioner's condition will probably be for life, was accomplished under standards less rigorous, and has consequences more onerous, than the ordinary civil commitment in Indiana. This violates the petitioner's right to the equal protection of the laws and this Court's holding in *Baxstrom v. Herold*, 383 U.S. 107 (1966).

Petitioner has had no trial and there is little prospect of his being made competent for trial. Confinement violates petitioner's constitutional right to bail, for denial of bail can be justified only when it assures that petitioner will be available for trial. Since petitioner's disabilities cannot be treated successfully by the state, his confinement will probably be permanent and cannot in any way be seen as increasing the likelihood of petitioner's appearing for trial. Further, because no treatment for his incompetency is possible or available, indefinite confinement by the state due to pending criminal charges violates petitioner's constitutional right to a speedy trial.

When an accused's incompetency is not correctable within a reasonably short period of time, the state is constitutionally required to resolve the outstanding criminal charge. The state must afford the incompetent defendant, through counsel, the opportunity to present any facts or arguments which would dispose of the charges and do not require his personal participation. The state may also bring petitioner to trial if, but only if, there is a judicial finding that a fair trial is possible notwithstanding petitioner's incompetency. His incompetency should be viewed as similar to other incapacities such as amnesia, other memory losses, unavailability of witnesses, and physical disabilities which, though they may require special procedures and evidentiary rules to redress, do not become an absolute bar to trial. If a fair trial under such procedures is not possible, or if the state does not choose to proceed immediately to trial, the state must dismiss the indictment, and rely upon civil commitment proceedings if any further confinement is thought necessary.

ARGUMENT

Introduction

Amici Curiae have a long-standing concern with laws which discriminate against the mentally ill and the mentally regarded.[1] The automatic incarceration for an indefinite term of persons accused of crime and found incompetent to stand trial is in this category. The instant case provides a particularly striking example of the inequities which can flow from this practice.

Petitioner is a 27-year-old deaf-mute with a mental age of 3-4 years. He has been accused of robbing $9.00 more than four years ago. He has denied the charges and has never been brought to trial because he was found to be incompetent to assist in his own defense. For almost three years he has been confined in state mental institutions. Based on this record, it appears that he will be confined for the rest of his life, since there is virtually no chance that he can ever be made "competent."

This indeterminate sentence was passed on petitioner without any finding that he was a danger to himself or to others; that he was unable to live independently in the community; that he had committed a crime; or that he could be made competent to stand trial. *Amici* submit that this petitioner's confinement deprives him of the equal

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[1] Though it is not suggested that this difference between mental illness and mental retardation should control the disposition of this case, any confusion created by the clumsy usage of the two terms should probably be dispelled.

Mental retardation, in contrast to mental illness, is not an illness but a condition. Persons who are mentally retarded are those whose normal intellectual growth was arrested at some time before birth, during the birth process, or in the early developmental years. As there is no "cure" for mental retardation, a person so afflicted will remain so throughout his life. The effects of his incapacity can, however, be alleviated in many cases by training aimed at teaching the retarded person to perform tasks necessary for working or leading an independent life.

protection of the laws, deprives him of his right to bail, and deprives him of his right to a speedy trial.

I. PETITIONER'S INDETERMINENT COMMITMENT TO A STATE MENTAL HOSPITAL, BASED SOLELY ON THE FINDING THAT HE IS INCOMPETENT TO STAND TRIAL, DEPRIVES HIM OF EQUAL PROTECTION OF THE LAWS.

A. Petitioner Could Not Have Been Civilly Committed For Mental Hospitalization On The Instant Record Under Indiana Law.

In *Baxstrom v. Herold,* 383 U.S. 107 (1966), this Court unanimously held that transfer of a convicted criminal from prison to a mental institution, thereby converting a determinate commitment to one that lasts until he no longer "continues insane," violated the equal protection guarantee unless that transfer was carried out "in conformity with proceedings granted all others civilly committed" under state law. 383 U.S. at 110, 115, n. 2. The Court concluded that the mere fact that Baxstrom was in state custody because he had violated a criminal law did not reasonably distinguish him from anyone else for whom the state might seek civil commitment in a mental hospital. As the Court stated, in determining "whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." 383 U.S. at 111-112.

In the instant case, petitioner was in state custody because he had been charged on two counts of robbery. Before trial, petitioner was found incompetent to stand trial and was indeterminately committed to the custody of the state "Division of Mental Health to be confined until such time that the Division . . . shall certify . . . that the [petitioner] is sane." (A. p. 10). Petitioner was found "insane" on the ground that he lacked "comprehension sufficient to understand the proceedings and make his defense" (Burns

Ind. Stat. § 9-1706a) because, as the Indiana Supreme Court stated, he "was a deaf mute with a moderately severe intellectual defect," *Jackson v. State,* ____ Ind., ____, 255 N.E.2d 515, 516 (1970). The committing court found only that petitioner was incompetent to stand trial. It did not find that petitioner required either treatment or custodial care in a mental hospital to guard against harm to himself or others. For all other persons civilly committed under Indiana state law, such findings are required.

Sections 22-1209 and 22-1201 (1) of the Burns Indiana Statutes authorize commitment of a "mentally ill person . . . who is afflicted with a psychiatric disorder which substantially impairs his mental health; and, because of such psychiatric disorder, requires care, treatment, training or detention in the interest of the welfare of such person or the welfare of others of the community in which such person resides." Section 22-1807 of the Burns Indiana Statutes authorizes commitment of "feeble-minded" persons who—as that term is in effect defined by Section 22-1801—"are feeble-minded and are therefore unable to properly care for themselves."[2]

Thus, whether petitioners disabilities are considered a "psychiatric disorder" or "feeble-mindedness" for purposes of Indiana law, it is clear that if he were considered for civil commitment, additional factual determinations would be required beyond the simple determination of insufficient "comprehension to understand the proceedings to make his defense" which was the sole factual predicate of petitioner's commitment in the instant case. The state must make

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[2]Section 22-1807, establishing the power of commitment, and section 22-1801, establishing the place of commitment and limiting its purposes to "care for . . . feeble-minded . . . unable properly to care for themselves," were enacted at the same time, in 1919, as parts of a comprehensive legislative scheme. These sections must thus be read as interdependent and mutually qualifying. See also, Official Opinion No. 49, *Opinions of the Attorney General of Indiana* (September 26, 1958).

these same additional factual determinations regarding petitioner before it may commit him to indefinite mental hospitalization.

The fact that petitioner was charged with a crime does not differentiate him from those whom the State civilly commits. The state's discriminatory treatment of petitioner as compared to the civilly committed violates petitioner's right to equal protection of the laws. As this Court stated in *Baxstrom:*

> "where the state has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed . . . it may not deny this right to a person in Baxstrom's position solely on the grounds that he was nearing the expiration of a prison term. It may or may not be that Baxstrom is presently mentally ill and . . . a danger to others . . . . All others receive a judicial hearing on this issue. Equal protection demands that Baxstrom receive the same," 383 U.S. at 114-115.

On the basis of the record at petitioner's hearing below, it is clear that he could not have been civilly committed under Indiana law. First, this record could not support a finding that petitioner "requires . . . treatment [or] training" in the state facilities. (Burns Ind. Stat. § 22-1201-(1)). One of the examining psychiatrists testified that, in view of the petitioner's life-long deaf-mutism coupled with his "moderately severe mental deficiency" (A. p. 19), "I question how much ability he has, how much more he can learn, therefore the prognosis appears rather dim." (A. p. 16). In addition, Mr. John Olson, supervising teacher of the state school for the deaf, examined petitioner "on four occasions about an hour and a half or two hours each time." (A. p. 24). As the dissenting Justice on the Indiana Supreme Court characterized his testimony, he "stated he knew of no facilities in this State which could help this [petitioner.] He also stated the School for the Deaf did not accept mentally retarded persons." 255 N.E.2d at 518. No testimony controverted these propositions, that petitio-

ner was so handicapped that no training or treatment had any successful prospect, or that in any event the state had no facilities available to train or treat petitioner.

Second, this record could not support a finding that petitioner is "feeble-minded and . . . therefore unable to properly care for" himself. (Burns Ind. Stat. § 22-1801). According to petitioner's mother who testified at the competency hearing below, petitioner held employment at the time he was arrested, notwithstanding his many disabilities. She testified that "since he has been here [in Indiana] he worked at the Holiday Inn . . . helping in the kitchen . . . and he worked in Mississippi with the building construction." (A. p. 21). No testimony suggested that petitioner needed custodial care because of his inability to care for himself. Respondent's brief, p. 5, correctly suggests that there might be "grave constitutional questions" presented by petitioner's commitment as a "feeble-minded person."

Third, this record could not support a finding that petitioner required "detention in the interest of the welfare . . . of others in the community." (Burns Ind. Stat. § 22-1201 (1)). The only hint of danger to others comes from the fact that petitioner had been charged with two counts of robbery, involving a total of $9.00 (See 255 N.E.2d at 518). There is no indication of any previous criminal conduct. The pending charges were not. of course, tested because petitioner was considered incompetent to stand trial. The charges were based on affidavits by complainants which had not been independently scrutinized in any judicial proceeding. Moreover, petitioner had pleaded "not guilty" to the charges. According to the joint report which the examining psychiatrists presented to the trial court, petitioner "denied flatly any responsibility for the acts [with] which he was charged . . . ." (A. p. 8).

In short, the sole basis for petitioner's commitment for indeterminate confinement in a mental hospital under the jurisdiction of the Indiana Division of Mental Health was that he had been found incompetent to stand trial in a state

criminal proceeding. The equal protection clause as interpreted in *Baxstrom v. Herold* forbids such state action. In *Baxstrom* the court ruled that "where . . . the state has created functionally distinct institutions," a person could not be transferred from "the jurisdiction of the Department of Correction" to institutions "under the jurisdiction and control of the Department of Mental Hygiene." (383 U.S. at 113) unless the state first established that person's illness and need for confined treatment by the same substantive standards and procedures as the state applied to all others committed to institutions under control of its mental health authority.

As the United States Court of Appeals for the Second Circuit has recently stated, "*Baxstrom* . . . sparked an awareness that we cannot tolerate two classes of insane persons—criminal and non-criminal—when we are asked to examine commitment procedures available to both." *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1081 (1969). See also *Specht v. Patterson*, 386 U.S. 605 (1967) (which, as the Second Circuit characterized it in *Schuster*, "further sharpened the distinction between a finding of criminal activity and a finding of commitability by reasons of mental illness") 410 F.2d at 1083); *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968); *Cameron v. Mullen*, 387 F.2d 193 (D.C. Cir. 1967); *Shone v. State of Maine*, 406 F.2d 844 (1st Cir. 1969); *People v. Lally*, 19 N.Y.2d 27, 224 N.E 2d 87 (1966).

The benefits of forced mental health treatment are themselves doubtful, (see, *e.g.*, Katz, "The Right to Treatment: An Enchanting Legal Fiction?", 36 *U. Chi. L. Rev.* 755 (1969). But for those such as petitioner, who are forced into the mental health system solely because of their entanglement with the criminal law, the benefits of such treatment—to the person committed or to society—in practice approach the vanishing point. In particular, these persons are disadvantaged as compared to the "ordinarily" civilly committed. Professor Norval Morris has graphically made this point:

> "Prison authorities regard their inmates in the facilities for the psychologically disturbed as both criminal and insane, bad and mad; mental hospital authorities regard their inmates who have been convicted—or only arrested and charged with crime—as both insane and criminal, mad and bad. While examining records in state mental hospitals I occasionally find notations in red ink to the effect that this person has been arrested for a crime. Discussion with the relevant authorities reveals that the red ink notation seriously influences the date of his likely discharge. Note that an arrest without a conviction has this effect."

N. Morris, "Psychiatry and the Dangerous Criminal," 41 *S. Calif. L. Rev.* 514, 525 (1968).

This hybrid status—criminal and insane, "mad" and "bad,"—has worked most particularly to the disadvantage of those, like petitioners, who have been committed to mental institutions because they have been found incompetent to be tried criminally. Most states follow Indiana's practice in imposing automatic, indeterminate commitment to state mental institutions following a finding of incompetency to stand trial.[3] By this automatic conjunction of its criminal and mental health custodial powers, these states take custody of persons which they would not, and could not, jus-

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[3]See, *e.g.*, Burns Ind. Stat. § 9-1706a(2), Code of Ala. § 15-426(2), 17 Ariz. Rev. Stat. 15-250(B), Cal. Crim. Proc. Code. §§ 10-1370, 1371, Conn. Gen. Stat. § 54-40(2), Ga. Code § 27-1504, Minn. Stat. § 631.18, Mo. Stat. §§ 545.760, 545.770, Mont. Rev. Code § 95-506(b) Nev. Rev. Stat. § 178.425, N.J. Stat. §§ 2A: 163-2, 30: 4-82, N. Car. Gen. Stat. § 122-83, N. Dak. Century Code § 29-20-02, Ohio Rev. Stat. § 2945.38, Utah Code § 77-43-5, Wis. Stat. § 957.13. *Compare* Note, "Incompetency to Stand Trial," 81 *Harv. L. Rev.* 454, 461 1967); "The widespread practice of automatically committing defendants incompetent to stand trial reflects an unawareness that the policies controlling whether a trial should be delayed are distinct from those controlling whether a person should be involuntarily committed. As a result, many of the present commitments of incompetent defendants serve no legitimate interest of the state."

tify if the "criminal law" or the "mental health law" rationale stood alone. The fact that a person has been charged with a crime does not justify indeterminate confinement; rights to bail and to a speedy trial stand as safeguards against this abuse of power for the ordinary criminal defendant. See sections II.A. and II.B., *infra*. And the fact that a person lacks intellectual capacity, either by reason of mental illness or mental deficiency, is not considered sufficient basis in most states (including Indiana) for forced mental hospitalization unless that incapacity seriously endangers either the person or the community. See Burns Ind. Stat. § 22-1201(1); Note, "Civil Commitment of the Mentally Ill: Theories and Procedures," 79 *Harv. L. Rev.* 1288 (1966); Lindman & McIntyre, *The Mentally Disabled and the Law* at 17-22 and Table II-B at 49 (Amer. Bar Fdtn. 161).

A finding that a person is not competent to stand trial does not by itself demonstrate danger to that person or to the community. Trial incompetency may be relevant to the questions of need for treatment and dangerousness; it cannot rationally be considered dispositive of either question. But state laws, such as the law of Indiana, which provides automatic commitment of all found incompetent, justify indefinite mental hospitalization of an indicted criminal defendant only because he appears in some degree "mad" and in some degree "bad" though in neither case would the "madness" or the "badness" justify such commitment on its own. Respondent in *Baxstrom v. Herold* argued that because Baxstrom was a convicted criminal the state need not show his mental illness by the same rigorous standards and procedures that it applied to the non-criminal mentally ill. But the Court, as noted, held such a state-imposed intermixture of "badness" and "madness" "wholly arbitrary" as a ground for compulsory hospitalization, 383 U.S. at 114. Petitioner's "badness" is much less persuasively demonstrated than was Baxstrom's; petitioner is merely charged with a criminal offense. And petitioner's "madness" is even less apparent than Baxstrom's, who had been diagnosed as

insane by a prison physician. Whatever the strength of Baxstrom's diagnosis, it referred generally to his capacity to function in society while petitioner has been diagnosed only as mentally incapable of effectively participating in a criminal trial.

B. The State Invidiously Discriminates Between Petitioner and Those It Civilly Commits Because The Standards For Release Applied To Petitioner Are More Onerous, And His Release Is In Fact Less Likely, Than Those Civilly Committed.

It is evident that petitioner's confinement for incompetency in a mental hospital will stretch for a considerable duration. As Justice DeBruler of the Indiana Supreme Court stated in his dissent in this case, on the basis of uncontroverted testimony at the hearing below, "there was almost no chance that [petitioner] ever could improve his understanding sufficiently to be tried . . ., in effect, the commitment of [petitioner] until he can comprehend the nature of the charge and assist in his defense is a commitment for life." 255 N.E.2d at 518. If petitioner had been civilly committed as "feeble-minded" under Section 22-1807 of the Burns Ind. Stat., he would be released as soon as, in the superintendent's judgment, his "mental and physical condition . . . justifies it." See Burns Ind. Stat. § 22-1814. In sharp contrast, petitioner will not now be released until he has become competent to stand trial, even if in the meantime he should be thought ready for release. See Burns Ind. Stat. § 9-1706a.

The thrust of modern mental health theories about the care and treatment of mental retardates is to integrate them into the community and "normalize" their lives to as great a degree as possible. Thus, it is quite likely that a "moderately-severe" retarded individual like petitioner could be released into a sheltered community environment within a short time regardless of whether he would ever be able to competently assist in the conduct of his trial. See generally, President's Committee on Mental Retardation, *Chang-*

ing Patterns in Residential Services for the Mentally Retarded (Monograph, 1969); *The Problem of Mental Retardation* (U.S. Department of Health, Education and Welfare, pp. 10-11).

Generally, forced mental hospitalization tends to last longer for those found incompetent to stand trial as compared to those committed by ordinary civil processes.[4] From the hospital authorities' perspective, the escape of an inmate committed with pending criminal charges appears likely to be regarded by the community with more terror than escape by those only "mad" and not also "bad." Thus, hospitalization in maximum security is more likely for committed incompetents as a group than for ordinary civil commitments as a group.[5] Moreover, home or community leave for committed incompetents is sharply restricted either by hospital officials' special fears or by statutory command in some states.[6] These special custodial

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[4] *Compare* New York practice, described as follows: "While civil state hospital patients are released into the community, Department of Correction patients are generally not so released. Matteawan and Dannemora [Department of Correction mental hospitals] patients, upon release from confinement in those institutions, are returned to courts for trial, returned to penal institutions or are transferred to civil state hospitals. One would expect under these circumstances that doctors would be more willing to release patients, and that, as a consequence, patient movement from Department of Correction mental hospitals would be more fluid than from Department of Mental Hygiene mental hospitals; the opposite is clearly true." G. Morris, "The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York." 17 *Buffalo L. Rev.* 651, 657 (1968).

[5] "[T]he central problem in 'restoration to competency' is that relatively few persons committed for incompetency are returned for trial. Most of them spend long intervals in the maximum security institution, some of them there virtually for life." Matthews, A.R., *Mental Disability and the Law* at 138 (Amer. Bar Foundation 1970).

[6] "As the interval after commitment lengthens . . . [t]he hospital officials are made aware that security hospitalization ceases being a prelude to conviction and becomes a substitute for it. If an inmate

restrictions on the hospital status of committed incompetents impede the possibility of treatment toward regained mental health.

In a careful study of committed incompetents in Massachusetts, Dr. Louis McGarry concluded that the "net effect . . . of an indefinite pretrial commitment weighs in the direction of obstructing rehabilitation and the return of the individual to society." "Competency for Trial and Due Process Via the State Hospital," 122 *Am. J. Psychiat.* 623, 626 (1965). Drs. McGarry and Bendt also compared a matched group of men committed for incompetence to stand trial and men who, though indicted for alleged crimes, had been civilly committed following dismissal of their indictments. McGarry found the average length of hospitalization for the

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is discharged who can no longer be tried but who may be dangerous, the hospitals know they will be held accountable if he commits another crime.

"As a consequence of these constraints, the hospitals as a defensive measure have turned to restrictive release policies in order to minimize the risks of mistakes in judgment. Aside from the law's requirements regarding release, there are few counter pressures on these policies. The inmate's contacts with friends and relatives are few and become fewer with time. Many were not represented by counsel or have ceased to be regarded as active cases by the counsel who did represent them. Institutional crowding, a great practical influence favoring release from mental hospitals generally, seems not to be a major factor in incompetency cases, perhaps because the number of these cases is a relatively small fraction of hospital population.

"When the interval of security hospitalization is long extended—several years or a decade—an additional problem arises. No one back in the 'home' locality is interested in the case. Except for especially notorious crimes, public officials and general public have forgotten about it and witnesses and victims would as soon not revive its memory. State hospital officials report that in some instances a year may go by before anyone from the originating court or prosecutor office will even answer mail on the matter. This lack of interest shifts entire responsibility for the release decision to the hospital. Exercise of the responsibility will, however, be 'reviewed' if the released person should commit an offense after the hospital has let him go." Matthews, *op. cit. supra*, at 139-40.

criminally incompetents was 61 months, while the average hospitalization for the comparable group of civilly committed was only 5.8 months. He concludes that "with respect to the length of hospitalization, our hypothesis of the negative effect of commitment in a criminal status is strikingly borne out . . .," McGarry and Bendt, "Criminal vs. Civil Commitment of Psychotic Offenders: A Seven-Year Follow-Up," 125 *Am. J. Psychiat.* 1387, 1391 (1969). As the Court of Appeals for the Second Circuit has found, in a related context, "the facts reveal that there always lurks the grisly possibility that a prisoner placed in [a state mental hospital for the 'criminally insane'] will be marooned and forsaken." *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1079 (1969). It is for just such practical as well as theoretical reasons that pretrial commitment to indeterminate mental hospitalization, based solely on incompetency to stand trial, should be held unconstitutional and that any pretrial commitment based on incompetency alone should be restricted only to those persons unlike petitioner for whom there is reasonable assurance that they will become competent within a reasonably short period of time.

II. PETITIONER'S INDETERMINATE CONFINEMENT WITHOUT TRIAL ON THE PENDING CRIMINAL CHARGES VIOLATES HIS CONSTITUTIONAL RIGHTS TO BAIL AND TO A SPEEDY TRIAL

A. Petitioner's Confinement Violates His Right To Bail.

The state has summarily denied bail to petitioner, simply as a consequence of finding him incompetent to stand trial and without any further inquiry regarding the need for pretrial confinement. State laws such as Indiana's that provide for automatic commitment following an incompetency finding implicitly or explicitly forbid pretrial release and "ex-

onerate bail."[7] This result violates the command of the Eighth Amendment that "excessive bail shall not be required . . .", Amdt. VIII, U.S. Constitution. Though the excessive bail clause of the Eighth Amendment has never expressly been held applicable to the states by this Court, there is strong authority for such a holding. See *Pilkinton v. Circuit Court of Howell County, Missouri,* 324 F.2d 45 (8th Cir. 1963): "we take it for granted that . . . the prohibition in the Eighth Amendment against requiring excessive bail must now be regarded as applying to the States, under the Fourteenth Amendment," 324 F.2d at 46. See also *Robinson v. State of California,* 370 U.S. 660 (1962); *United States ex rel. Fink v. Heyd,* 287 F. Supp. 716 (E.D. La. 1968); *United States ex rel. Siegal v. Follette,* 290 F. Supp. 632 (S.D.N.Y. 1968); *Jackson v. Bishop,* 268 F. Supp. 804 (E.D. Ark. 1967). The bail right is similarly guaranteed in most state constitutions, including Indiana's.

In considering the application of this constitutional guarantee to criminal defendants, this Court has held, "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Stack v. Boyle,* 342 U.S. 1, 5 (1951).

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[7]See, *e.g.,* Burns Ind. Stat. § 9-1706(a)(2), (3), Code of Ala. § 15-426(5) ("In no event shall such person be set at large so long as such prosecution is pending, or so long as he continues to be insane."), 17 Ariz. Rev. Stat. 15-250(B), Calif. Crim. Proc. Code § 10-1371, Nev. Rev. Stat. § 178.430. The Federal Statute on this subject, 18 U.S.C. § 4247, permits confinement of an incompetent defendant to a federal security hospital only if the court finds that "if released, accused probably will endanger the safety of officers, the property, or other interests of the United States." See, *e.g., Maurietta v. Ciccone,* 305 F. Supp. 775 (W.D. Mo. 1969). A number of states similarly require a finding of "dangerousness" to justify pretrial commitment of an incompetent defendant. See Iowa Code § 783.3, Okla. Stat. § 22-1167, S. Dak. Compiled Laws § 23-38-6, Idaho Code § 19-3304. See also Kansas Stat. § 59-2007, Ore. Rev. Stat. § 426-300(1) permitting forms of parole from commitment notwithstanding the pending criminal charges.

Although a finding of incompetency to stand trial may raise doubts as to whether the meaningful presence of defendant at his trial can be assured, automatic commitment to a state mental institution cannot possibly be considered "relevant to the purpose of assuring the presence of that defendant" at trial, unless it can be shown that such commitment will, with some degree of likelihood, lead to the increased competency of the defendant.

In *Stack v. Boyle*, an unusually high money bail was set. This Court there held:

> "If bail in an amount greater than that usually fixed for [similar] . . . charges of crime is required in the case of any of the petitioners, that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved." 342 U.S. at 6.

In the instant case, bail was denied outright, an even more effective pretrial restraint than in *Stack*. In the instant case, all of the evidence at the hearing below indicated that denial of bail and commitment to a state mental institution were in no way relevant to assuring petitioner's ultimate presence at trial. All of the witnesses who addressed the question agreed that there was virtually no likelihood that commitment of this mentally defective deaf-mute to state institutions that had no capacity to treat his disabilities would lead to petitioner's ultimate competency to stand trial. On the basis of such a record, petitioner cannot be denied admission to bail. Compare, *United States v. Klein*, 325 F.2d 283 (2d Cir. 1963).

This Court's holding in *Greenwood v. United States*, 350 U.S. 366 (1955), is consistent with this position. *Greenwood* held that an incompetent criminal defendant, indicted for a Federal offense, could be confined in a federal mental institution for treatment. The petition in *Greenwood* argued that his prognosis for recovery was insufficient to justify this confinement. The Court implicitly acknowl-

edged that an unfavorable prognosis could in itself invalidate an incompetency commitment, but it held on the facts of that case that the level of uncertainty regarding the petitioner's prognosis justified his confinement. The Court stated:

> "We cannot say that Federal authority to prosecute has been irretrievably frustrated. The record shows that two court-appointed psychiatrists found petitioner sane and competent for trial. While the District Court did not accept their conclusion, their testimony illustrates the uncertainty of diagnosis in this field and the tentativeness of professional judgment." 350 U.S. at 375.

In the instant case, there is no basis in the record for finding a similar "uncertainty of diagnosis" or "tentativeness of professional judgment" regarding petitioner's present incompetency or his prospects for future competency. The *Greenwood* Court carefully limited its holding on this issue: "We decide no more than the situation before us presents and equally do not imply an opinion on situations not now before us." 350 U.S. at 376. *Greenwood* cannot be stretched to justify petitioner's confinement on the record of this case.

It is admittedly not easy for a court to draw lines between those incompetent defendants whose prognosis is or is not sufficient to justify pretrial detention. But the constitutional right to pretrial freedom is clearly at stake in any such detention. A court must therefore determine that pretrial confinement for an incompetent in a mental hospital is "relevant to the purpose of assuring the presence of that defendant" at a future trial, *Stack v. Boyle, supra.* This judicial determination is necessary to assure that the defendant's constitutional right is to be adequately protected.

It might be argued that, though commitment cannot plausibly lead to petitioner's competency to stand trial, it is justified to protect society against his dangerous proclivi-

ties. But that argument is not tenable. First, it has never been decided by this Court that denial of bail on grounds of "dangerousness" is constitutionally permissible. See, *e.g.*, Tribe, "An Ounce of Detention: Preventive Justice in the World of John Mitchell," 56 *U.Va. L. Rev.* 371 (1970). Second, even if denial on such grounds is permissible, there has been no adequate showing of "dangerousness" in this case. As this Court stated in *Stack v. Boyle*, in a related context, "To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act." 342 U.S. at 6. It should be noted that the incompetency commitment upheld by this Court in *Greenwood v. United States, supra*, was based in part on an explicit finding by the trial court that the defendants' release would "probably . . . endanger the safety of officers, the property, or other interests of the United States." 350 U.S. at 372. Third, even the most ardent proponents of the constitutionality of bail denial for "dangerousness" do not suggest that indeterminate commitment with no assurance of ultimate trial on the charges is constitutionally permissible. See Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention," 55 *U. Va. L. Rev.* 1223, 1239 (1969); D.C. Code § 23-1322(d)(2)(A) (pretrial detention law setting a 60-day limit on detention and requiring trial as quickly as practicable). Petitioner's commitment could not thus be justified, even accepting the propriety of bail denial for "dangerousness." Because there is so little likelihood of ultimate trial, if petitioner is regarded as so dangerous by reason of his proclivities and his mental state that he cannot be permitted at large, the state is constitutionally required to resort to ordinary civil commitment proceedings.

Compare *Cook v. Ciccone*, 312 F. Supp. 822, 824 (W.D. Mo. 1970):

> "Where an unconvicted person is confined in federal custody under 18 U.S.C. § 4244 or § 4246, and it is clear that his lack of competency to stand trial is permanent . . . such person should be ultimately transferred to the appropriate state authorities for

> adequate control and treatment. In the event that state authorities will not accept the accused, consideration must be given to his outright release from federal custody . . . . Such consideration is dictated by the inherent unfairness and substantial injustice in keeping an unconvicted person in federal custody to await trial where it is plainly evident his mental condition will not permit trial within a reasonable period of time."

See also, *Martin v. Settle,* 192 F. Supp. 156 (W.D. Mo. 1961); *Maurietta v. Ciccone,* 305 F. Supp. 775 (W.D. Mo. 1969); *United States ex rel. von Wolfersdorf v. Johnston,* 317 F. Supp. 66 (S.D. N.Y. 1970): (20-year confinement of incompetent defendant in state hospital for the "criminally insane"; the Court, ordering release, stated, "Nobody has suggested that we ought to weigh seriously the miniscule chance that [relator] will ever become competent before he dies. And yet respondent [the state] perseveres in the argument that relator must stay where he is because he is 'in confinement on a criminal charge . . . .'" 317 F. Supp. at 67).

B. Petitioner's Confinement Violates His Right to a Speedy Trial

Indefinite commitment to a mental institution violates petitioner's "right to a speedy . . . trial." Amdt. VI, U.S. Constitution; *Klopfer v. North Carolina,* 386 U.S. 213 (1967). Many state statutes provide without qualification that prosecution for the indicted offense will resume whenever during his indefinite commitment a defendant becomes competent to stand trial as if no delay had taken place.[8]

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[8]See, *e.g.,* Burns Ind. Stat. § 9-1706a ("upon the release of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity.") 17 Ariz. Rev. Stat. 15-250(B), Mo. Stat. § 545.770, Ohio Rev. Code § 2945.38, R.I. Gen. Laws § 26-4-5, Utah Code § 77-48-5, Wyo. Stat. § 7-241(b). By con-

A number of federal courts have, however, rejected the assumption that the speedy trial right has no relevance to a committed incompetent defendant. See *United States ex rel. von Wolfersdorf v. Johnston,* 317 F.Supp. 66 (S.D. N.Y. 1970); *In re Harmon,* 425 F.2d 916 (1st Cir. 1970) ("[W]e are disturbed by the defendant's lengthy confinement, now approaching a year, without the safeguards of a trial on the offense charged, or formal commitment proceedings addressed to defendant's ability to function in society. Such confinement not only erodes the values protected by the right of a speedy trial, but also seems to be of questionable clinical value. See A. Rosenberg, 'Competency for Trial,' 53 *Judicature* 316, 317 (March 1970)." 425 F.2d at 918); *United States v. Jackson,* 306 F. Supp. 4 (N.D. Calif. 1969) (". . . the prognosis of long-term future incompetence . . . and no federal facility available in which [the accused] can receive medical, not penal treatment . . . leaves this Court with no alternative but to honor the constitutional mandate that a person is guaranteed a speedy trial . . . ." 306 F. Supp. at 6).

The speedy trial right, as applied to incompetent defendants, does not require dismissal of an indictment automatically upon the incompetency finding, any more than the constitutional right to bail requires automatic pretrial release of an incompetent defendant. See part II.A., *supra.* The Court of Appeals for the District of Columbia Circuit has properly framed the issue:

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trast, New York recently enacted a statute providing for dismissal of felony charges against incompetent defendants following compulsory mental hospital commitment for "two-thirds of the authorized maximum term of imprisonment for the highest class felony charged in the indictment. . .", N.Y. Criminal Procedure Law § 730.50(3) (1970 Supp.). For all misdemeanor charges, an incompetency finding brings a 90-day commitment "for care and treatment in an appropriate institution" and the court "must dismiss the indictment . . ." *Id.* § 730.50(1). *Compare* Mont. Rev. Code § 95-506(b) (discretionary dismissal of charges following restored competency.)

> "The Supreme Court said in *Beavers v. Haubert,* 1905, 198 U.S. 77, 87 . . . .
>
> > '. . . The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.'
>
> "To hold that delay occasioned by the accused's mental incompetence to stand trial always requires dismissal of his indictment would be to ignore the 'rights of public justice.' On the other hand, to resume the prosecution of the accused after long delay may in some circumstances violate his rights beyond the requirement of public justice." *Williams v. United States,* 250 F.2d 19, 21 (D.C. Cir. 1957).

Petitioner in the instant case was charged on May 5 and May 6, 1968 with two crimes alleged to have been committed in July, 1967. On October 23, 1968, an examination of petitioner's competency was ordered. On December 26, 1968, the trial court found petitioner incompetent and commited him to the state Division of Mental Health. Almost three years have elapsed since petitioner's commitment and more than four years have passed since the dates of the alleged crimes. It perhaps cannot conclusively be said that this delay has irrevocably prejudiced petitioner in ultimately defending himself against the criminal charge, if he were ever brought to trial. There is, however, a strong presumption of prejudice from this time passage alone. Moreover, protection against such prejudice is not the only purpose of the speedy trial right. As this court has stated,

> "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell,* 383 U.S. 116, 120 (1966).

The prejudicial effect of the long delay following petitioner's arrest and commitment on any future trial is not the only wrong that he has suffered from denial of his right to

a speedy trial. Because there was virtually no likelihood at the time of commitment that his hospitalization would lead to his competency to stand trial, petitioner's commitment is "undue and oppressive incarceration." *United States v. Ewell, supra.*

It cannot sensibly be maintained that petitioner's commitment following his incompetency finding was accompanied by his waiver of the speedy trial right. Some courts and commentators have espoused this view of incompetency commitments, *e.g., State v. Violett,* 79 S. Dak. 292, 111 N.W.2d 598 (1961); Note, 20 *Stan. L. Rev.* 476, 480 (1968), but this view is untenable. Precisely because a defendant is found incompetent to stand trial, one cannot attribute to him "knowing and intelligent" waiver of any of his constitutional rights. As this Court stated in a related context:

> "It is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate v. Robinson,* 383 U.S. 375, 384 (1966).

If waiver is to be attributed to an incompetent defendant, it should be only done where pretrial delay is clearly analogous to those delays for which competent defendants are held responsible, such as repeated motions, *e.g., Osborne v. United States,* 371 F.2d 913, 925-26 (6th Cir. 1967), or other delays "welcomed by defendants as . . . [operating] in their favor." *United States ex rel. von Cseh v. Fay,* 313 F.2d 620, 623 (2nd Cir. 1963). Since it is unreasonable to expect an incompetent defendant independently to weigh the merits of delaying his trial, the courts must themselves make that judgment in order to determine whether the delay is attributable to the defendant or is "caused by the deliberate act of the government." *United States v. Provoo,* 17 F.R.D. 183, 201, *aff'd mem.,* 350 U.S. 857 (1955).

In the instant case, there is no plausible way to argue that trial delay would work to petitioner's advantage. Because his incapacities will not likely be remedied during the

delay, and because he will be forced by the state to remain incarcerated until his incapacities are remedied, it is absurd to contend that postponing trial is in any way advantageous to petitioner. Indeed, under the Indiana statute it appears that even if all of the witnesses to the alleged crime died during petitioner's incarceration, he would not have standing to move for dismissal of the charges until he was found "competent to stand trial." Compare, *e.g.*, New York's practice under a similar statutory scheme, as noted by the court in *United States ex rel. von Wolfersdorf v. Johnston*, 317 F. Supp. 66 (S.D.N.Y. 1970); *United States v. Barnes*, 175 F. Supp. 60 (S.D. Calif. 1959); Foote, "A Comment on Pre-Trial Commitment of Criminal Defendants," 108 *U. Pa. L. Rev.* 832, 841 (1960). Accordingly, since petitioner could not—except by the wildest stretch of unreason—want his trial postponed on condition that he remain permanently confined in a mental institution, this postponement cannot be viewed as benefiting or attributable to him. Since the postponement can at most only serve the government's interests by keeping an alleged "dangerous mentally ill person" from society, it must be considered a "deliberate act of the government," a delay which is both "purposeful" and "oppressive," *Pollard v. United States*, 352 U.S. 354, 361 (1957). In the circumstances of this case, the postponement must therefore be judged to violate petitioner's constitutional right to a speedy trial.

In sum, based on the preceding argument, it is evident that, to adapt this Court's previous description of the juvenile court, there are substantial

> "grounds for concern that the [incompetent criminal defendant] receives the worst of both worlds: that he gets neither the protections accorded to [criminal defendants] nor the solicitous care and regenerative treatment postulated for [the civilly committed]." *Kent v. United States*, 383 U.S. 541, 556 (1966).

The right to a speedy trial permits a temporary postponement of trial in order that an incompetent defendant may be treated and rendered competent. But the Constitution

does not permit an indefinite postponement of trial. After a reasonable period of time, if the defendant has not improved sufficiently to be considered competent to stand trial, this delay and this confinement must be ended.

III. STATES HAVE ADEQUATE MEANS TO PROTECT THE RIGHTS OF BOTH THE PUBLIC AND INCOMPETENT DEFENDANTS WITHOUT RELIANCE ON INDETERMINATE CONFINEMENT FOR THOSE FOUND INCOMPETENT TO STAND TRIAL.

As indicated above, the indefinite confinement to a mental hospital of criminal defendants who are found incompetent to stand trial violates the constitutional right to the equal protection of the laws, the right to bail, and the right to a speedy trial. The Constitution permits only a temporary postponement of trial in order that an incompetent defendant may be treated and rendered competent; it does not permit state action indeterminately to postpone trial.

If the defendant has a poor prognosis for a speedy restoration to competence, states have a variety of options which they can utilize to assure fairness to incompetent defendants without sacrificing the public interest. First, the state may apply civil commitment procedures to an incompetent defendant in appropriate cases and dismiss the criminal charges outstanding against him. Second, the state may allow the defendant, through his attorney, to make any motions which are capable of fair determination without the defendant's personal participation. It is in both the defendant's and the state's interests to resolve such matters. Third, the state may criminally try an incompetent defendant, if it can give sufficient assurances that a fundamentally fair trial is possible notwithstanding the defendant's disability. In this regard, mental incompetence should be viewed as similar to other disabilities, such as amnesia, other forms of memory loss, or other physical disabilities which may affect a defendant's ability to fully exercise his constitutional rights at trial, but which have not been held to be an absolute bar to trial.

A. States May Apply Civil Commitment Procedures to Incompetent Criminal Defendants in Appropriate Cases If Outstanding Criminal Charges Are Dismissed.

One of the options open to a state in dealing with an incompetent criminal defendant whose prognosis for recovery within a reasonably short time is poor, is to resort to civil commitment procedures. Once the state makes the determination, however, that it wishes to commit indefinitely—that is, to commit civilly—the incompetent defendant, it must dismiss the criminal charges against him.

The purpose of the criminal process must be to move toward the resolution of criminal charges. Thus, trial must be the objective being sought at all times. When there are unreasonable delays in this process, or when the purpose of the criminal process as it is applied to a particular person charged with crime no longer is to bring that person to trial, the process is abused. Under such circumstances, it has long been held an inherent power of the courts to dismiss the charges against a defendant. See, *e.g., United States v. Kovacs,* 150 F. Supp. 301 (E.D.N.Y. 1957); *United States v. Apex Distributing Company,* 270 F.2d 747 (9th Cir. 1959); *United States v. Dallego,* 311 F. Supp. 227 (E.D. N.Y. 1970); Federal Rules of Criminal Procedure, Rule 48(b), 18 U.S.C.A. As one court described this situation:

> "We can conceive the anarchy which would result if the power to terminate a criminal proceeding for want of prosecution did not exist. Defendants might have prosecutions hang over their heads, like the sword of Damocles, for years, without an effort being made to bring him to trial. And yet, if the prosecutor should refuse to try them, and the court acquiesce, they would be at his mercy." *Ex parte Altman,* 34 F. Supp. 106, 108 (S.D. Calif. 1940).

It is evident that the notion of fundamental fairness to a defendant, which is inherent in the concept of due process,

must take this situation into account. When efforts are no longer being made to bring a defendant to trial, the charges against him must be dropped, and incarceration based upon those charges must be ended. When a criminal defendant is civilly committed to a mental institution after a finding that he is not likely to be restored to competence in a reasonable time, efforts are no longer being made to bring him to trial. Consequently, to allow criminal charges to remain outstanding against such a person, to allow this "sword of Damocles" to hang over his head, would be manifestly unjust. When a person is civilly committed, criminal charges against him should be dismissed.

It may be that, as a matter of constitutional doctrine, an identical result—dismissal of criminal charges—is compelled in the instant case. The petitioner is not expected ever to "recover" in such a way as to allow criminal proceedings to proceed; hence, in practical terms, efforts are no longer being made to bring him to trial. A court ruling that required dismissal of the charges against petitioner would be eminently reasonable. To permit the criminal charge to remain outstanding for petitioner's lifetime with no effort ever being made to bring him to trial would work a disproportionate and oppressive injustice whether or not he remained in state custody because of the charge. (Nothing in the record suggests that petitioner could be civilly committed under Indiana law (see pp. 6-9, *supra*) or that institutionalization is appropriate for petitioner. *Amici* submit that incompetent defendants who can function in the community, cannot be treated, and do not pose a threat to the community, should not in any case be deprived of their liberty.)

B. An Incompetent Defendant May Make Any Motion Susceptible of Fair Determination Without His Personal Participation.

Even though a defendant may not be competent to be criminally tried, it is clear that many motions which could be dispositive of the charges against him do not require his assistance. Motions regarding such matters as the suppres-

sion of illegally seized evidence, the exclusion of illegally obtained statements and confessions, or the dismissal of charges based on the lapse of the statute of limitations governing the alleged offense are examples. Notwithstanding his incompetency, his attorney must be allowed to make such motions. See *Neely v. Hogan,* 310 N.Y.S.2d 86 (1970), (a state statute providing for the suspension of criminal proceedings against an incompetent defendant does not suspend the defendant's right to make motions addressed to the dismissal of the indictment, but only suspends the right of the state further to prosecute the defendant.)

With regard to such motions, the personal participation of the defendant is not necessary, and to bar his attorney from making these motions could create the substantial injustice of preventing the dismissal of the charges which led to the defendant's confinement in the first place. See Wisc. Stat. § 957.13 (5) ("The fact that the defendant is unfit to proceed does not prevent the making and determination . . . of any legal objection which is susceptible of fair determination before trial without the personal participation of the defendant."); Rev. Codes of Mont. § 95-506 (c) (1957); Annotated Code of Maryland Art. 59, § 24(a) (1970 Supp.); N.Y. Criminal Procedure Laws § 730.60(5) (1971).

C. States May, in Some Circumstances, with the Assurance of Fundamental Fairness to the Defendant, Criminally Try an Incompetent Defendant.

Though dictum in *Pate v. Robinson,* 373 U.S. 375, Part III.A., *supra,* appears to foreclose any possibility of trial for one found incompetent, the specific holding in that case does not compel this result. *Pate* held that where the record showed some doubt of a criminal defendant's competency, the state must conduct a hearing to determine competency before it could proceed with the trial. It is implicit in this holding that, if a defendant is found incompetent at such hearing, the state cannot then simply ignore this finding and immediately proceed to trial. But *Pate* does not

necessarily hold that, following an incompetency finding, the state is barred from proceeding to trial at all times in all conceivable circumstances. A court might conclude that a fundamentally fair trial of an incompetent defendant was possible by resort to special trial procedures. For example, a court might require a higher standard of proof—proof which negated all reasonable hypotheses of innocence; or require independent corroboration of all incriminating evidence including the testimony of eyewitnesses; or require full discovery in advance of trial of the prosecution's case. *Cf. Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968), discussed in Part III.D.1, *infra*. In general, the burden of establishing the fairness of the procedure would be on the prosecution. *Pate* does not necessarily foreclose the possibility of trial under such circumstances. *Pate* requires that the state not ignore a defendant's incompetency, and that the possibility be recognized that his mental state will render any trial constitutionally unfair. But a particularized, adequately supported judgment that a fair trial is possible notwithstanding a defendant's incompetency could satisfy the mandate of *Pate*.

The Supreme Court of Illinois has recently decided a case directly analogous to the instant case. In *People ex rel. Myers v. Briggs*, 46 Ill. 2d 281, 263 N.E. 2d 109 (1970), the defendant was an illiterate deaf-mute who was found incompetent to stand trial and committed to the state Department of Mental Health. 263 N.E. 2d at 110. The superintendent of the commitment institution concluded that the defendant apparently "will never acquire the necessary communication skills needed to participate and cooperate in his trial." 263 N.E. 2d at 111. The Illinois Supreme Court ruled as follows:

> "This court is of the opinion that this defendant, handicapped as he is and facing an indefinite commitment because of the pending indictment against him, should be given an opportunity to obtain a trial to determine whether or not he is guilty as charged or should be released." 263 N.E. 2d at 113.

In reaching this conclusion, the Illinois court's reasoning is instructive:

> "The general rule in handling the trial of a criminal defendant who is handicapped by deafness, blindness or other affliction is that a trial judge should afford such a defendant reasonable facilities for confronting and cross-examining the witnesses as the circumstances will permit . . . . The fact of blindness or deafness of the accused may lessen the ability and capacity of the defendant to utilize his constitutional rights, but this will not prevent his being subject to trial. In the proper administration of justice, however, the court should give a person accused of crime a reasonable opportunity to obtain the benefit of his constitutional rights. If he is deaf, such opportunity as may be necessary should be allowed for communication to him of the testimony of the witnesses to insure him a full and fair exercise of his legal rights." 263 N.E. 2d at 113.

D. Mental Incompetency, Like Other Disabilities Which Impair a Defendant's Ability To Defend Himself, Should Not Be Considered an Absolute Bar to Trial.

This Court should view mental incompetency like other disabilities which, although they substantially impair a criminal defendant's ability to defend himself, are not considered absolute bars to trial. Examples of such disabilities are memory loss of the events at the time of the alleged crime (whether from amnesia or from simple passage of time), unavailability of important witnesses, or physical incapacity. For these disabilities (many of which impinge upon important constitutional rights), courts have evolved working rules to give wide latitude to criminal defendants in order to become more "competent to stand trial." But when these disabilities cannot be overcome within a reasonable time, courts have generally held that the public interest in conducting a criminal trial should prevail. At such trial, in many instances, special procedures have been adopted to mitigate the deleterious consequences to the defendant of the continuing disability. But trials of such "disabled de-

fendants" have taken place, and have been held to meet constitutional requirements of fairness.

1. *Trial Incompetency from Defendant's Memory Loss by Amnesia.*

A defendant's diminished capacity to stand trial because he has amnesia of the events surrounding the alleged crime works the same disability on a defendant whether or not that amnesia is clearly linked to a diagnosed mental illness.[9] The Court of Appeals for the District of Columbia Circuit has recently recognized the anomaly in this treatment of the non-mentally ill amnesic defendant. In *Wilson v. United States,* 391 F.2d 460, 463 (1968), the Court acknowledged that amnesia, whether or not the accused suffers from a defined "mental illness," can raise the constitutional issue of competency to stand trial. But the court further held that the presence of amnesia was not necessarily a bar to trial. Rather, the Court stated "the probability of prejudice, not lack of memory per se, [is] controlling" 391 F.2d at 464 n. 4.

In order to limit the possibility of prejudice from the defendant's amnesia, the Court required that the trial court pay close attention, and make specific findings of fact at the conclusion of the trial, regarding the possibility that the

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[9]See Note, "Amnesia: A Case Study in the Limits of Particular Justice," 71 *Yale L.J.* 109, 116 (1961):

> ". . . there is no record of any court holding a defendant incompetent to stand trial solely on the basis of amnesia . . .. [This] rule produces anomalous results for while the policy underlying the doctrine of competency focuses on the impairment of the rational ability of the accused to conduct his defense, the rule presently applied by the courts is conditioned upon the fortuitous presence of a narrowly defined mental disorder. Thus, a schizophrenic may have extraordinary recall and appear perfectly rational yet be spared trial because of the rather speculative effect of his possibly impaired orientation or perspective, while the amnesic defendant is forced to stand trial under obvious disabilities."

defendant's amnesic condition deprived him of a fair trial in the particular circumstances of that trial. In particular, because of the defendant's incompetency, the Court required that the government satisfy a quite extraordinary burden of proof at trial—"such as to negate all reasonable hypotheses of innocence." 391 F.2d at 464, 465.

In *Wilson,* as in the instant case, expert testimony established that the accused "almost certainly never will" recover from the disability which impaired his competency to stand trial. 391 F.2d at 462. Thus the *Wilson* court faced the same problem as is presented by the instant case: whether to incarcerate the accused for life without trial (though ostensibly under statutory authority to hospitalize him until he becomes competent), whether to require dismissal of the charges, or whether to attempt to bring the accused to trial while protecting him from the deleterious consequences of his incapacities. The *Wilson* court's resolution of this problem should commend itself to this Court. In applying the traditional doctrines of mental incompetency to stand trial, courts have not engaged in the kind of particularized inquiry that the *Wilson* court suggests. But insistence on drawing closer causal links between a defendant's incompetency—where competency is not likely to quickly be restored—and the ways in which that incompetency will prejudice him at trial will protect the defendant's constitutional right to a fair trial and his constitutional right to speedy disposition of the charges against him.

It should be noted that the *Wilson* court did not order that a trial be held but rather that the court below assure itself that a fair trial could be conducted notwithstanding the defendant's incompetency. As the Court stated, "if . . . the Government is unable to overcome the unfairness . . . the indictment will be dismissed." 391 F.2d at 464. A similar disposition should govern the instant case. Compare, *Reagon v. State of Indiana,* __ Ind. __, 251 N.E. 2d 829 (1969).

2. *Trial Incompetency by Defendant's Memory Loss from Extensive Passage of Time.*

Passage of time between the date of an alleged crime and the trial date can also drastically reduce an accused's capacity to defend himself. Our law traditionally has protected defendants against this incapacity in two ways, by statutes of limitations and by the constitutional right to a speedy trial. The constitutional right has, however, customarily only been applied to the time following arrest or indictment. See Note, "The Right to a Speedy Trial," 20 *Stan. L. Rev.* 476, 485 (1968). In a recent series of cases, the District of Columbia Court of Appeals has addressed the problem of defendants' memory disabilities flowing from purposeful government delay between the alleged commission of the crime—narcotics sales—and indictment. In those cases, the delay was justified by the government on the ground that its undercover agents must remain anonymous for long periods of time to retain their usefulness, and accordingly these agents can publicly divulge their incriminating information in a criminal indictment only at the conclusion of their undercover service. The District of Columbia Circuit Court acknowledged that such delay could seriously incapacitate a defendant, but it refused to rely on this "trial incompetency" as an absolute bar to prosecution. Rather, as in *Wilson, supra,* the Court required the defendant to make a particularized showing of prejudice, to establish that the disability imposed by the delay in fact worked to his prejudice given the specific charges and the defendant's specific needs. See, *e.g., Woody v. United States,* 370 F.2d 214 (D.C. Cir. 1966); *Worthy v. United States,* 352 F.2d 718 (D.C. Cir. 1965), *vacated on other grounds,* 384 U.S. 894 (1966); *Cannady v. United States,* 351 F.2d 817 (D.C. Cir. 1965); *Ross v. United States,* 349 F.2d 210 (D.C. Cir. 1965). In particular, as in *Wilson, supra,* the strength of the Government's case, including whether the complaining witness' testimony was independently corroborated, was

considered a central determinant of the fairness of convicting an accused notwithstanding the "trial incompetency" worked by the delay in his arrest and indictment. See *Ross v. United States, supra; Morrison v. United States,* 365 F.2d 521 (D.C. Cir. 1965); *Bey v. United States,* 350 F.2d 467 (D.C. Cir. 1965), *cert. denied,* 385 U.S. 905 (1966).

Though the analogy between these "narcotics delay" cases and the instant case is not precise, it nonetheless strongly suggests the legitimacy of accommodating criminal defendants' interests in having the highest degree of "trial competency" with the government's legitimate interest in bringing a "less than fully competent" defendant to trial for alleged criminal conduct.

3. *Trial Incompetency from Unavailability of Witnesses.*

A criminal defendant has a constitutional right "to have compulsory process for obtaining witnesses in his favor." Amdt. VI, U.S. Constitution. The inability of a defendant to produce a known key witness in his favor can as clearly and completely undermine his capacity to make his defense as petitioner's disabilities in the instant case. Yet the mere assertion by a defendant that he wants a trial continuance to exercise his right to locate favorable witnesses is not sufficient for an automatic trial postponement. Rather, as the Court of Appeals for the Tenth Circuit has held,

> "When a continuance is sought to obtain witnesses, the accused must show who they are, what their testimony will be, that the testimony will be competent and relevant, that the witnesses can probably be obtained if the continuance is granted, and that due diligence has been used to obtain their attendance on the day set for trial." *Leino v. United States,* 338 F.2d 154, 156 (1964).

See also, Wright, *Federal Practice and Procedure,* §832 at p. 338 (Continuances) (1969).

This generally prevailing rule suggests that though a defendant has a constitutional right to be "free from trial incapacity" resulting from absent witnesses, the prejudice from that incapacity must be shown with considerable particularity. Moreover, though every reasonable effort must first be made to remedy the defendant's incapacity, at some point the government's interest in conducting a criminal trial must take precedence. Once again, though the analogy of this rule to the instant case is not precise, it is strongly suggestive.

4. *Trial Incompetency from Defendant's Physical Disabilities.*

In *United States v. Knohl,* 379 F.2d 427 (2d Cir. 1967), the court acknowledged that physical disability can be a proper ground for finding a defendant incompetent for trial, stating that "it will usually be the better course, where there is reasonable ground to believe that physical disability may prevent a proper defense or endanger the life of a defendant, for the trial court to hold an evidentiary hearing as close to trial as practical." 379 F.2d at 437. But the court clearly implied that such physical disability need not be an absolute bar to trial where adequate techniques for protecting the reasonable interests of the defendant are available. The court stated,

> "The judge's own observation of the accused and the opportunity to adjust the trial itself to needs of one suffering physical disability by shortening court sessions, affording the accused periods of rest and having present such medical and nursing aids and attendants as may be needed, give particular cogency to the trial court's estimate of the circumstances and to its disposition of the matter." 379 F.2d at 437. See also, Wright, *Federal Practice and Procedure,* § 832 (Continuances) (1969).

Once again, though the analogy is not precise, this practice suggests the propriety of adopting a similar approach for the instant case.

5. *Trial Incompetency from Defendant's Disruptive Behavior.*

This Court recently permitted a substantial modification of constitutionally mandated criminal trial procedures to respond to special trial difficulties presented by a criminal defendant. In *Illinois v. Allen,* 397 U.S. 337 (1970), this Court ruled that, notwithstanding the Sixth Amendment's confrontation guarantee, an unruly defendant could be tried while physically absent from the courtroom It might be argued that *Allen* permitted an *in absentia* trial because the defendant willfully misbehaved. But this Court in *Allen* approved the court's action removing defendant, which might in itself have contributed to the likelihood that the defendant would be convicted of an offense which resulted in a prison term of ten to thirty years. Unless the Court was satisfied that, in the circumstances of that case, it was fair to try Allen outside his presence, infliction of such a deprivation simply as a punishment for his trial misconduct seems vastly disproportionate.

It should also be noted that there was a suggestion in the record that Allen himself "was a sick person . . . who may or may not have been insane in the classical sense but who apparently had a diseased mind." 397 U.S. at 356-57 (Mr. Justice Brennan, concurring). Immediately following his indictment on the charges for which he was ultimately convicted, Allen had been found incompetent to stand trial; a year later he was found competent and trial followed, accompanied by the disruptive behavior noted. 397 U.S. at 357 n. 5 (Mr. Justice Brennan, concurring). (On the significance of disruptive behavior at trial as suggesting incompetency, see *Pouncey v. United States,* 349 F.2d 699 (D.C. Cir. 1965)). *Allen* may thus be seen as this Court's approval of special rules to conduct a fair trial of a possibly incompetent defendant. Moreover, as this Court made clear in *Allen,* a trial court "must indulge every reasonable presumption," 397 U.S. at 343, until it becomes clear that trial is impossible without special procedures.

When dealing with incompetent defendants generally, trial courts must similarly explore every possibility that a defendant can be made fully competent to stand trial within a reasonably short period of time. But where, as in the instant case, it is evident that no reasonable treatment possibilities are available to make the defendant competent, the state cannot postpone definitive resolution of the outstanding criminal charges.

Some jurisdictions have permitted an incompetent defendant to go to trial in order to establish his innocence, but refused to permit conviction. Under this approach, if a defendant fails to establish his innocence, the criminal charge is held in abeyance and the defendant is committed to a mental hospital until he becomes fully competent to stand trial. See West's Wisc. Stat. Ann. § 957.13(5); N.Y. Criminal Procedure Laws § 730.60(4)(1971); West's Mass. Gen. Laws Ann. C.123, § 17 (1971 Supp.); [English] Criminal Procedure (Insanity) Act 1964 (c. 84) §4; *R. v. Roberts*, (1953), 2 All Eng. Rep. 340 (Devlin, J.).

It is submitted, however, that this more limited approach is not necessary. If a defendant who is unlikely to be made competent in a reasonable time, is brought to trial following a judicial determination that in the particular circumstances of the case it is fair that he be tried, and if the defendant's innocence is not established, it serves no one's interest—neither the defendant's nor the state's—to hold the criminal charge in abeyance until the defendant becomes competent. For such defendant this resolution would mean that a criminal charge would hang over him indefinitely. From the state's perspective, it would be best to have definitive resolution of the criminal charge against the defendant in a single proceeding at which it was determined, first, whether the criminal charge could proceed to trial or must be dismissed, and, second, if trial were possible, whether the defendant was guilty or innocent.

The basic premise of this argument is that mental incompetency, like other incompetencies that may touch impor-

tant constitutional rights, need not be an absolute bar to trial, but that there can be circumstances in which an incompetent defendant can be fairly tried and convicted as well as tried and acquitted. Special trial procedures, in addition to special burdens of proof on the government, may well be necessary to assure a fair proceeding. But by employing such special procedures and substantive rules, it is submitted that the constitutional norm of fairness can be satisfied. In view of the substantiality of the constitutional right at stake, see *Pate v. Robinson, supra,* the state should be required to discharge a heavy burden of proof before it can establish that a fair trial is possible notwithstanding a defendant's incompetency.

This Court should not, however, absolutely foreclose the state from bringing an incompetent defendant to trial if it can be shown that a fair trial is possible notwithstanding the particular disabilities which afflict the defendant. If such a fair trial is not possible, the state is then compelled to dismiss the criminal charges. It is clear, however, that the state is not compelled to bring any incompetent defendant to trial, whether or not a fair trial can be conducted. The state can instead choose to dismiss the indictment (as New York has chosen with regard to all misdemeanor charges against defendants found incompetent, see N.Y. Criminal Procedure Law § 730.50(1) (1970)). Following dismissal of the indictment for any of the foregoing reasons, the state may choose to invoke civil commitment proceedings in which its interests in public protection can be vindicated.

CONCLUSION

The Court should permit the state to have a wide range of options, consistent with principles of fundamental fairness, in dealing with incompetent criminal defendants, such as petitioner, whose incompetency does not appear remediable within a reasonably short period of time. This Court must conclusively withdraw only one option from the state: the option to keep such defendant indefinitely incarcerated

in a limbo status, without opportunity for definitive resolution of the criminal charge hanging over him. Such status is not necessary to protect any legitimate public interest, and it infringes drastically upon the incompetent defendant's rights.

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